

DECISION



THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D.C. 20548

FILE: B-209322.2

DATE: June 6, 1983

MATTER OF: Commonwealth Communications, Inc.

DIGEST:

1. Contracting agency's failure to notify awardee of protest does not confer substantive rights on awardee whose contract was terminated when agency agreed with protester but, rather, proper remedy is that protest will be reheard with participation of awardee. This protest is essentially that rehearing.
2. Where solicitation requests separate bid prices for telephone system and public address system, bid which states that public address system is included in price for telephone system is responsive even though life cycle cost analysis is performed only on telephone system and telephone system price is required for analysis, because only reasonable reading of bid is that total price is for telephone system and public address system is being provided at no cost. Also, bidder is bound to provide both systems at stated price.
3. VA's correction of obviously mistaken quantities in bidder's bid cost worksheet does not render bid nonresponsive because bidder's unit prices were not changed and solicitation advised bidders that such adjustments could be made.

Commonwealth Communications, Inc. (CCI), protests the termination by the Veterans Administration (VA) of its contract for a telephone and public address system at the VA Medical Center, Wilkes Barre, Pennsylvania, and the proposed award of the remainder of the contract to Universal Communication Systems, Inc. (UCS). The controversy stems from the VA's actions in evaluating bids and awarding a contract under the second step (invitation for bids (IFB) No. 693-15-80) of a "two-step" procurement.

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We find no merit in the protest.

The bid schedule of the IFB was separated into schedule "A," "Replace Telephone System," and schedule "B," "Install Public Address System." Schedule "A" provided four pricing options for bidders--two separate lease options, a lease with option to purchase and a purchase option. Schedule "B" listed only a purchase option. Under both schedules was a line for total aggregate price, with a notation that the price would be totaled by the Government after it selected one of the options under schedule "A." The prices for the schedule "A" options are 10-year life cycle costs. Bidders were required to complete bid cost worksheets showing how those prices were reached. The schedule "B" price, a purchase price only, was not to be listed on the worksheets. Award was to be made for the entire system to the bidder with the lowest aggregate price.

Three bids were received. UCS's bid listed \$892,053 as the price of the purchase option for the telephone system. In the pricing blank under schedule "B," UCS wrote "Included in 4," the purchase option for the telephone system in schedule "A." UCS's aggregate price was low. CCI's bid was next low with a bid of \$979,718 for the telephone system purchase option and \$56,600 for the public address system, for an aggregate price of \$1,036,318.

Immediately after bid opening, CCI protested to VA, arguing that UCS's bid should be rejected because it had violated the solicitation's bidding instructions by including the price for the public address system in the price for the telephone system. CCI contended that this made a proper bid evaluation impossible. The next day, at the request of the contracting officer, UCS provided the breakdown of its bid price, stating that \$18,566 of the total represented the cost of the public address system. The contracting officer then determined that UCS's bid was responsive because it had clearly stated that the public address system was included in the telephone system price and UCS was bound to provide both at that price. The contracting officer denied CCI's protest, and CCI appealed it to a higher level within VA.

According to the VA, as part of the bid evaluation in telephone procurements, it routinely examines the bid cost worksheets and corrects obvious errors or omissions by bidders so that the 10-year life cycle costs can be

compared on an equal basis. The step-one solicitation had provided bidders with quantities of additional telephone lines, key sets, cards and additional related maintenance for estimated future system growth. The second-step solicitation increased those quantities. The quantities and corresponding unit prices were to be entered in the bid cost worksheets. In evaluating UCS's worksheet, the VA noticed that UCS had used the step-one quantity figures. The VA considered this an obvious error and corrected the figures. The correct figures were then multiplied by UCS's unit prices to yield slightly higher prices for each growth area.

In evaluating UCS's bid cost worksheet, the VA deducted the cost of the public address system that UCS had provided after bid opening from the figure entered by UCS as the telephone purchase price. VA also used the corrected quantity figures for growth. Based on these figures, the price for the telephone system was \$909,718, and the aggregate price was \$928,284.

After bids were evaluated, the VA sustained CCI's protest on appeal and awarded the contract to CCI. VA found that the UCS bid was nonresponsive because the initial purchase price of the telephone system could not be determined without the post-bid-opening breakdown from UCS of the combined telephone system/public address system price. Since that figure is important in determining the life cycle cost, upon which award is made, the VA concluded that UCS had the opportunity to alter the relative standing of the bidders with its post-bid-opening price breakdown and, thus, decide after bid opening whether it, or another bidder, would be awarded the contract.

UCS then protested to GAO, arguing that its bid was responsive because it would remain the low bidder no matter how the combined price was broken down and because it had unequivocally promised to provide both systems. Before VA submitted its protest report to GAO, it determined that UCS was correct in its assertion that its bid price was low under any possible breakdown of the combined price. Consequently, the VA found that UCS could not have altered the standing of bidders and that no other bidder was prejudiced by UCS's failure to separately price the public address system in its bid. Based on that analysis,

the VA terminated CCI's contract for the convenience of the Government and proposed to award the remainder of the contract to UCS. UCS then withdrew its protest at GAO.

CCI then filed this protest at GAO, arguing that UCS's bid was nonresponsive and that VA deprived it of due process rights by failing to advise it of UCS's protest. CCI also filed suit in the United States District Court for the Middle District of Pennsylvania (Civil Action No. 83-0102), requesting injunctive and declaratory relief. The court issued a temporary restraining order, and the parties then entered into a stipulation that the order would remain in effect until GAO issues a final decision on the CCI protest.

As a preliminary matter, we will consider CCI's argument that the termination was improper and award to UCS would be improper because CCI was deprived of its due process rights when VA failed to notify CCI of UCS's GAO protest. CCI points to GAO's Bid Protest Procedures, at 4 C.F.R. § 21.3 (1983), and section 1-2.407-8(c) of the Federal Procurement Regulations (FPR) (1964 ed. amend. 68), as requiring notice to interested parties, and CFE Air Cargo, Inc., B-185515, August 27, 1976, 76-2 CPD 198. CCI argues that it was prejudiced by the lack of notice because it was unable to present its views to GAO or to VA prior to VA's voluntary agreement with UCS's protest and because it continued to perform the contract during the pendency of the protest, thus incurring substantial costs.

VA argues that the regulations do not specify when notice of a protest must be given. VA states that it normally provides notice of protests to interested parties when it files its protest report with GAO. VA also argues that the intent of the regulations is not to permit interested parties to provide their views to contracting agencies, but rather to GAO. Here, since remedial action was taken without a GAO ruling and no report was filed, the protest was moot and no notice was required. Also, VA notes that, as a practical matter, CCI's views were already a matter of record with VA from the earlier CCI protest to VA.

While we agree with VA that the regulations do not require notice to interested parties at any specific time, we think that the policy underlying the regulations is

better served by agencies providing notice soon after the protest is filed. In any event, even assuming that the VA should have given notice to interested parties immediately after the protest was filed, the remedy is not substantive, but procedural. The CFE Air Cargo decision cited by CCI holds that the appropriate remedy is a reconsideration of the protest. Essentially, that is what CCI is receiving in this case. Also, we find CCI's contention that the lack of notice prejudiced it because it continued to perform the contract during the pendency of the protest to be without merit. The filing of a protest with GAO does not confer upon the awardee the unilateral right to stop work on the contract. Consequently, barring a stopwork order from VA, CCI was required to continue work on the contract in accordance with the performance schedule even if it had notice of the protest. Also, the costs incurred by CCI are reimbursable under the termination cost provisions of its contract.

CCI argues that UCS's bid is nonresponsive in two respects--first, that UCS used the incorrect growth quantity figures in its bid cost worksheet and, second, that UCS did not provide separate prices for the telephone system and public address system. Essentially, CCI contends that UCS's bid was nonresponsive at bid opening because it deviated from the bidding instructions and because those deviations involve material aspects of the bid--those that affect price, quantity or quality. CCI argues that from UCS's bid, the VA could not evaluate the actual 10-year life cycle cost because it did not know the purchase price of the telephone system alone--the base figure from which the life cycle cost analysis starts. Also, since UCS had inserted the wrong growth quantity figures, CCI contends that the VA could not determine whether the correct quantities would be provided at the quoted unit prices. In addition, CCI contends that the growth quantities are integrally related to other figures in the bid cost worksheet that were not changed, because the increased quantities for growth require additional capital equipment over what was required under the original quantities. The additional equipment would be reflected in the initial purchase price or in the "other growth" cost

entry. CCI assumes that because UCS used the original growth quantity figures, it probably based the other costs on those figures. Consequently, those costs must have been underestimated in UCS's bid. According to CCI, this brings UCS's entire 10-year price into question.

CCI argues that since UCS's bid as submitted was nonresponsive, neither the post-bid-opening clarification by UCS nor the post-bid-opening corrections by VA could be considered in evaluating UCS's bid. Permitting the clarification and corrections improperly gave both UCS and the VA the opportunity to manipulate UCS's bid to determine UCS's bid price and to decide which bidder was low.

VA essentially admits that UCS's combination of the telephone system and public address system prices introduces an element of doubt into the determination of UCS's exact price because the 10-year life cycle cost of the telephone system is partially determined by the purchase price of the telephone system. Since the total price submitted by UCS does not separate the prices, the exact purchase price of the telephone system is not determinable from UCS's bid. However, the VA contends that no other bidder is prejudiced because, regardless of how the total price is broken down between the telephone system and the public address system, UCS's bid is always the low bid. In support of this assertion, the VA provided 10 hypothetical price breakdowns ranging from one extreme--all of the price allocated to the telephone system--to the other extreme--all of the price allocated to the public address system. The relationship between the prices is that the greater the amount of the price that is allocated to the public address system, the higher the total aggregate price. However, even the extreme example which allocates all of the combined price to the public address system results in a price which remains the low bid.

Concerning the revision of the growth quantity figures in UCS's bid worksheets, VA points to our decision in Rolm Corporation, B-200995, August 7, 1981, 81-2 CPD 106, which VA claims approved this method of bid evaluation in two-step, formally advertised telephone system procurements. In any event, the VA points out that only quantity figures that were previously determined were corrected and then were multiplied by unchanged unit prices in order to arrive

at the correct totals. Therefore, there was no post-bid-opening manipulation of UCS's bid.

Concerning the combined bid price, UCS argues that its bid was clear and that no post-bid-opening clarification was needed to permit the VA to evaluate its bid. According to UCS, its bid could only be reasonably read in the following way. UCS's total price was for the telephone system and UCS was essentially offering the public address system at a bid price of zero. Consequently, the 10-year life cycle cost evaluation can be performed using the information as bid. Also, UCS clearly is bound to provide both systems at that bid price. According to UCS, the post-bid-opening price breakdown was not necessary for bid evaluation and was provided only because the VA requested it.

Concerning the revision of the growth quantity figures, UCS contends that CCI's protest is untimely. UCS alleges that CCI knew of the quantity revisions more than 10 working days before it raised the issue at GAO. Therefore, the issue is untimely, because protests must be filed within 10 working days of knowledge of the basis for protest. 4 C.F.R. § 21.2 (1983).

We agree with UCS's analysis of the responsiveness of its combined bid price for the telephone and public address systems. UCS's bid stated that the public address system was included in the price for the telephone system, and the latter price was clearly the total price. UCS's bid cost worksheet showed that the total bid price was arrived at solely from the life cycle cost of the telephone system, in that no entry for the public address system was required or made. The only reasonable reading of the UCS bid is that UCS was offering the public address system at no additional price beyond the telephone system price. The bidding instructions did not prohibit bidders from bidding the public address system as a no-cost addition to the telephone system. In this regard, UCS's bid meets the requirements for responsiveness that the bidder unequivocally agree to meet all of the Government's requirements at a firm, fixed price determinable from the bid. Therefore, no further information was required from UCS to permit the VA to conduct the 10-year life cycle cost analysis for the telephone system. Consequently, the post-bid-opening clarification requested by the VA and

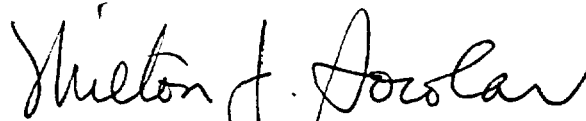
supplied by UCS is irrelevant for bid evaluation purposes and should not have been used to evaluate UCS's bid. We note that the UCS bid would be lower as a result of our conclusion.

Concerning the second responsiveness issue of whether the VA's correction of UCS's incorrect growth quantity figures was proper, it is irrelevant whether CCI's protest of this issue is timely because we routinely consider untimely issues in protests where a court has requested our decision. Craft Machine Works, Inc., B-202257, May 3, 1982, 82-1 CPD 407.

We agree with the VA's analysis of this issue. The Rolm decision does sanction the VA's adjustment of bid cost worksheets in procurements like this one, so that bidders' 10-year life cycle costs can be compared on an equal footing. CCI attempts to distinguish the Rolm decision from this case by arguing that in Rolm, the solicitation explicitly permitted such adjustment, while the solicitation here does not. However, the relevant portions of the two solicitations are identical. Both solicitations advise bidders that "the number of installations and relocations (moves) anticipated by the VA from the known or projected maximum growth of the system are entered and multiplied by the original MRC and NRC provided by the bidders." That is exactly what the VA did in both Rolm and here. No changes were made in the unit prices entered by UCS; only obvious corrections were made in the already determined quantities.

In summary, the UCS bid is responsive, and the evaluation of UCS's bid properly included the price increases resulting from VA's quantity changes, but the life cycle cost evaluation must be based on UCS's entry for the telephone system installation/purchase price in its bid cost worksheet.

Accordingly, it is our view that the protest is without merit.



Acting Comptroller General
of the United States